

(1993) 07 OHC CK 0024
In the Orissa High Court
Case No : Second Appeal No. 259 of 1991

Sadhu Meher

APPELLANT

Vs

Rajkumar Patel

RESPONDENT

Date of Decision : 30-07-1993

Acts Referred:

Central Provinces Tenancy Act, 1920 — Section 105, 12
Civil Procedure Code, 1908 (CPC) — Section 100
Criminal Procedure Code, 1973 (CrPC) — Section 145
General Clauses Act, 1897 — Section 21
Orissa Land Reforms Act, 1960 — Section 2, 3
Transfer of Property Act, 1882 — Section 53A

Citation : AIR 1994 Ori 26

Hon'ble Judges : B.N. Dash, J

Bench : Single Bench

Advocate : S.M. Mohanty, for the Appellant; S.N. Sinha, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Dash, J.—This is the plaintiff's appeal against the reversing decree of the learned Subordinate Judge, Bargarh in a suit for declaration of his title to and recovery of possession of Ac. 0.03 decimals of land appertaining to plot No. 768 under Khunti No. 1 of village Dahits in the district of. Sambalpur.

2. Undisputedly, the entire suit plot No. 768 measuring an area of Ac. 0.50 decimals belonged to one Akshaya Kumar Muchu who belonged to Scheduled Tribe. The plaintiff's case was that he purchased Ac. 2.72 decimals of land from Akshaya Kumar Muchu by two registered sale deeds, one dated 12-1-1968 (Ext. 4) covering an area of Ac. 1.03 decimals and the other dated 13-2-1968 (Ext. 5) covering an area of Ac. 1.59 decimals including the entire suit plot No. 768. Akshaya Kumar Muchu, being of Scheduled Tribe the sale deeds were not valid for want of necessary permission u/s 22 of the Orissa Land Reforms Act, 1960 (hereinafter to be referred to as "the Act") which was in force in the area at that time. Therefore, in order to regularise the transactions Akshaya Kumar Muchu

applied for and obtained necessary permission u/s 22 of the Act from the competent authority, as per Ext. 3 and thereafter he executed a fresh registered sale deed on 19-1-1971 (Ext. 2) covering the entire area under Exts. 4 and 5. After execution of Exts. 4 and 5, the plaintiff possessed the lands conveyed thereunder but the defendant having raised dispute with regard to the suit land, a proceeding u/s 145, Cr.P.C. was started and the same having ended in favour of the defendant, as per Ext. 7, the suit was filed for the aforesaid reliefs.

3. The defendant denied the title and possession of the plaintiff over the suit land. According to him, the plaintiff actually purchased Ac. 0.47 decimals out of the suit plot No. 768 and not the whole of it. He asserted that on 3-5-1963 Akshaya Kumar Muchu had orally sold the suit land to him for a consideration of Rs. 80/- by delivery of possession and in evidence thereof he had executed a plain paper sale deed in his favour on that day (Ext. D). At any rate, on 13-2-1968 the plaintiff agreed to transfer the suit land to the defendant and for that purpose the plaintiff purchased the stamp papers, Ext. 8. It was, thus, claimed that the defendant was protected from eviction u/s 53A of the Transfer of Property Act, 1882 (hereinafter to be referred to as "the T. P. Act").

4. The trial court decreed the suit with the findings:--

(i) that the defendant's purchase was hit by Section 22 of the Act and Section 46 of the C. P. Tenancy Act for want of necessary permission of the competent authorities;

(ii) that the defendant was not in possession of the suit land prior to the plaintiff's purchase;

(iii) that the purchase by the plaintiff was valid and ever since the date of purchase he was in possession of the suit land;

(iv) that there was no agreement by the plaintiff to convey the suit land in favour of the defendant; and

(v) that the defendant is not entitled to protection u/s 53A of the T. P. Act.

5. The appellate court allowed the appeal dismissing the plaintiff's suit with the findings :--

(i) that the sale in favour of the defendant being dated 3-5-1963 and the relevant provision of the Act i.e., Section 22 without any retrospective operation having come into force with effect from 1-10-1965, the finding of the trial court that the sale in favour of the defendant was hit for want of necessary permission from the competent authority under the said section is not supportable;

(ii) that the finding of the trial court that the sale transaction in favour of the defendant is void for want of necessary permission of the Deputy Commissioner u/s 46 of the C. P. Tenancy Act is also not sustainable because u/s 95 of the C. P. Tenancy Act, the Civil Court has no jurisdiction to hold such transaction as void;

(iii) that the defendant's purchase was to the knowledge of the plaintiff for which the plaintiff purchased the stamp papers (Ext. 8) undertaking to execute a registered sale deed for the suit land in favour of the defendant later on; and

(iv) that ever since the date of his purchase on 3-5-1963 under Ext. D, the defendant was in possession of the suit land and his possession was liable to be protected u/s 53A of the T. P. Act.

6. Before advertng into the merit of the appeal, it may be pointed out at the outset that Section 46 and Section 95 of the C. P. Tenancy Act referred to by the trial court and appellate court are of the Act of 1898. But this Act has been repealed by the C. P. Tenancy Act of 1920. This fact was perhaps not brought to the notice of the courts. The corresponding provisions in the new Act are Section 12 and Section 105. Therefore, any reference to Section 45 and Section 95 may be read as Section 12 and S. 105 respectively of the C.P. Tenancy Act, 1920 (for short, "the Tenancy Act").

7. Mr. B. H. Mohanty, the learned counsel for the appellant has raised the following contentions :--

The first contention is that the plain paper sale deed, Ext. D, does not disclose that the same was in respect of the suit land and as such the appellate court went wrong in his finding that the suit land had been conveyed under the sale deed in favour of the defendant. The second contention is that the sale in favour of the defendant being in a plain paper sale deed and being without the necessary prior permission of the competent authority, was an invalid transaction and as such, the appellate court could not have given him the benefit of Section 53A of the T. P. Act. The last contention is that after the disposal of the proceeding u/s 145, Cr.P.C. in favour of the defendant, the plaintiff was obliged under the law to approach the civil court for declaration of his title and recovery of possession in respect of the suit land and therefore, the finding of the appellate court that the civil court had no jurisdiction to try such a suit in view of the bar u/s 105 of the Tenancy Act is not sustainable.

8. The first contention relates to a question of fact and the appellate court, as the final court of facts, having recorded the finding that the plain paper sale deed, Ext. D covers the suit land and such finding being not unreasonable, it is not permissible for the appellant to contend in this second appeal that the suit land is not covered by the plain paper sale deed, Ext. D. So the first contention must fail. (See *Mithilesh Kumar and Another Vs. Prem Behari Khare, and Maniar Ismail Sab and Others Vs. Maniar Fakruddin and Others*,).

9. So far as the second contention is concerned, it may be readily said that the defendant cannot claim the benefit u/s 53A of the T. P. Act on the basis of the stamp papers (Ext. 8) because it is not an agreement in writing which is the foremost pre-condition to seek benefit u/s 53A of the T. P. Act. It is then to be found out whether on the basis of the plain paper sale deed, Ext. D, the defendant is entitled to protection u/s 53A of the T. P. Act. The conditions

necessary for making out the defence of part performance to an action in ejectment by the owner are :

(1) that the transferor has contracted to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(2) that the transferee has, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession continues in possession in part performance of the contract;

(3) that the transferee has done some act in furtherance of the contract; and

(4) that the transferee has performed or is willing to perform his part of the contract.

If these conditions are fulfilled then notwithstanding that the contract, though required to be registered, has not been registered or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefore by the law for the time being in force, the transferor or any person claiming under him is debarred from enforcing against the transferee any right in respect of the property of which the transferor has taken or continued in possession, other than a right expressly provided by the terms of the contract. There is no controversy that the section applies not only to contract to transfer as such, but also to the instruments of transfer. In the present case the defendant having claimed benefit on the basis of his possession by virtue of a void sale transaction the question arises whether by virtue of his possession on the basis of such a void transaction the defendant will be entitled to the benefit of the doctrine of part performance of contract enshrined in Section 53A of the T. P. Act. In *Narayan v. Vithoba* AIR 1927 Nag 177 such a question came up for consideration and a learned single Judge came to hold :--

"Where the flaw in the transaction is not a mere defect of form or the absence of some formality normally necessary, but the transaction is one which is void ab initio, the doctrine of part performance cannot be applied."

10. In the case of *Muthabathula Arjaya Vs. Rambala Venkata Surya Gopala Krishnamurthy and Another*, there was a contract of sale which was said to be opposed to Section 5 of the Madras Hereditary Village Offices Act (Madras Act 3 of 1895). It was contended therein that since contract for transfer was violative of Section 5 of the Madras Hereditary Village Offices Act Section 53A of the T. P. Act would not be a defence. While repelling such contention, a Full Bench of the Andhra Pradesh High Court held as under (at page 245) :--

"We, therefore, hold that in a case where possession is obtained under an agreement of sale in respect of a service inam land, the provisions of Section 53A of the Transfer of Property Act cannot be resorted to by the would be vendee to maintain his possession. In such a case if the inamdar is to file a suit for

possession of the inam land Section 53A of the Transfer of Property Act would not be a defence."

11. In *Gaddam Narsa Reddy and Others Vs. Collector, Adilabad District and Others*, there was a sale of land by a member of the Scheduled Tribe in contravention of the provision u/s 3(1)(a) of the A.P. Scheduled Areas Land Transfer Regulation (1 of 1959) and the amendments subsequent thereto. The question that came up for consideration was whether the purchaser could seek protection u/s 53A of the T.P. Act. A Full Bench of the Andhra Pradesh High Court came to hold that a person in possession of immovable property in agency tract by virtue of a transfer made in contravention of the provisions of Section 3(1)(a) would not be entitled to claim the benefit of Section 53A of the T.P. Act whether it conforms to the relevant provisions of the Transfer of Property Act, Registration Act or the Hyderabad Tenancy and Agricultural Lands Act.

12. I am in respectful agreement with the views taken by the Nagpur High Court and Andhra Pradesh High Court and hold that the defendant is not entitled to ask for protection of his possession u/s 53A of the T. P. Act, his possession being on the basis of a void transaction.

13. As to the last contention, it is urged by Mr. S.N. Sinha for the respondent that even if the plain paper sale under Ext. D is an invalid document for want of registration and necessary prior permission of the competent authority, the plaintiff was required to approach the revenue authority u/s 12 of the Tenancy Act as amended in 1953 within the time prescribed and not the civil Court in "view of the bar u/s 105 of the Tenancy Act. In order to render a finding on the above rival contentions of the parties, it is necessary to note Section 12 of the Tenancy Act as amended by Orissa Act XV of 1953 and also Section 105. Section 12 as amended, so far material, is as under :--

"Section 12(1) An occupancy tenant shall not transfer his holding or any portion thereof except to the extent and in the manner hereinafter provided, namely :--

(a) He may sublet his right in his holding or any portion thereof for one agricultural year; provided that no contract for such lease shall be made more than four months before the year to which it relates, or shall contain a clause for renewal;

(b) An occupancy tenant shall have the right to transfer his holding or any portion thereof either by sale or mortgage or gift or bequest or otherwise to a bona fide agriculturist :

Provided that if he is a member of a Scheduled Tribe, he shall not so transfer to any person who is not a member of the same or different Scheduled Tribe except with the previous permission in writing of the Deputy Commissioner.

Explanation-xxxxxx

(c) The right to transfer a holding or a portion thereof by an occupancy tenant in

the manner provided in Clause (b) may also be exercised in favour of a Grama Panchayat established under the Orissa Grama Pan-chayats Act, 1948 or subject to the previous permission in writing of the Deputy Commissioner in favour of a public institution anything contained in this Act to the contrary notwithstanding.

(d) All such transfers except in case of a bequest or a lease as contemplated under Clause (a) shall be by a registered document.

(2) to (3) xxxxx

(4) If any transfer is made in contravention of the provisions of this Section, the Deputy Commissioner may, either on his own motion or on application by the transferor or his successor-in-interest, declare the transfer void and evict the transferee from the holding or a part of the holding, as the case may be :

Provided that no such transfer shall be declared void or such transferee liable to eviction after the expiry of twelve years from the date of his coming into possession of the holding or a part of the holding in pursuance of such transfer.

Section 105, as far material, is extracted below :--

"Except as otherwise provided in this Act, no Civil Court shall entertain any suit instituted, or application made, to obtain a decision or order on any matter which the Provincial Government, a Revenue or Settlement Officer is, by this Act, empowered to determine, decide or dispose of; and, in particular and without prejudice to the generality of this provision, no Civil Court shall exercise jurisdiction over any of the following matters :--

14. It will appear from Section 12 that there was a clear embargo for an occupancy tenant belonging to a member of a Scheduled Tribe to transfer his holding or any portion thereof to any person who is not a member of the same or different Scheduled Tribe except with the previous permission in writing of the Deputy Commissioner. Further, as per Section 12(1)(c) all transfers visualised under Clauses (a) and (b) of Sub-section (1) of Section 12, except in case of a bequest or a lease as contemplated under Clause(a), were to be by a registered document. In this case, the sale deed, Ext. D being not a registered instrument and the same having not been executed after obtaining prior permission of the competent authority cannot but be held as an invalid document and the defendant could not acquire any title thereunder, but then the question arises whether in view of Section 105 of the Tenancy Act it was permissible for the plaintiff to approach the civil Court. It will appear from the aforesaid section that the jurisdiction of the civil Court has been clearly ousted where he can obtain a decision or order on any matter which, inter alia, a Revenue Officer is empowered to decide under the Tenancy Act. u/s 12(4) of the Tenancy Act power has been given to the Deputy Commissioner not only to declare a transfer void, if such transfer has been made in contravention of the provisions of that section but also to evict the transferee from the land so transferred. It is not disputed that the Deputy Commissioner is a revenue officer.

15. In this case the plaintiff's prayer being only for declaration of title to and recovery of possession of the suit land the same could have been granted by the Deputy Commissioner because he could have legally evicted the defendant by declaring the transfer in his favour void, when the Deputy Commissioner was competent to take a decision on this score, it was not permissible for the plaintiff to approach the civil Court in view of the bar in Section 105 of the Tenancy Act.

16. It is then urged by Mr. B.M. Mohanty for the appellant that since the defendant's possession over the suit land had been declared u/s 145, Cr.P.C. the only remedy available to the plaintiff was to file suit to obtain possession after declaration of his title thereover. In support of such contention, no authority could be cited. u/s 145(6), Cr.P.C, the Magistrate declares the possession of one party and forbids disturbance of his possession until evicted in due course of law. The question for consideration is whether the expression "in due course of law" necessarily implies filing of a suit in civil Court. Such a question came up for consideration in the case of Duana Moliko and Another Vs. Bhagabat Bisoi and Others, . It has been held therein that several courses are open to a party when adverse order is made against him. He may file suit u/s 9 of the Specific Relief Act to recover possession, notwithstanding any other title that may be set up in such a suit. He may also file a suit as provided under Article 47 (Old) Limitation Act within 3 years, from the date of final order u/s 145(6), Cr.P.C. to recover property comprised in such order being a person bound by the said order respecting the possession of the property. He may also take recourse to other remedies where available for eviction of the other party under any statute. It has also been held that the decree or order of eviction passed by a Revenue Court or any statutory authority other than the civil Court is also one passed "in due course of law" within the meaning of Section 145(6), Cr.P.C. Similar view has also been taken in Nata Padhan and Others Vs. Banchha Baral and Others, .

17. I am in respectful agreement with the view taken in those decisions and hold, rejecting the contention raised on behalf of the appellant, that after being unsuccessful in a proceeding u/s 145, Cr.P.C. a party can approach not only the civil Court but also any other forum/authority competent to grant the reliefs he is required to ask for. In this suit the plaintiff requires the relief of declaration of title and recovery of possession in respect of the suit land. As per Section 12(d) of the Tenancy Act, since the Deputy Commissioner was statutorily competent to give him the reliefs, in view of the bar in Section 105 of the Tenancy Act, the suit filed by him was incompetent.

18. It is lastly urged by Mr. B.M. Mohanty for the appellant that the Tenancy Act having been virtually repealed by the Act, the filing of the suit in the civil Court by the plaintiff was competent. He is unable to point out the specific provision in the Act which has repealed the Tenancy Act. He merely relies on Section 3 of the said Act in support of his argument which is extracted below :--

"3. Act to override other laws -- Save as otherwise provided the provisions of this Act shall have effect, notwithstanding anything to the contrary in any other law,

custom or usages or agreement, decree or order of Court."

I am unable to comprehend how by the aforesaid section, the Tenancy Act has been repealed. It is urged by Mr. Mohanty that since Section 23 of the Act visualises eviction of a transferee if he has purchased the land from a person belonging to Scheduled Tribe without prior permission of the competent authority, it can very well be said that the tenancy Act containing similar provision was no longer in force at the time of the suit. All that Section 3 says is that the provisions in the Act shall have the effect notwithstanding anything to the contrary in any other law, custom, usages, agreement, decree or order of the Court. This section does not say that if there is similar provision in any other law, the same will not have any effect. So it can never be said that Section 3 of the Act has repealed the Tenancy Act. So, this contention must also fail.

19. In view of what has been discussed above, although the defendant is not entitled to any protection u/s 53A of the T.P. Act, the suit of the plaintiff, as held by the appellate Court, was liable to be dismissed in view of the bar laid down in Section 105 of the Tenancy Act. That being so, the ultimate conclusion of the appellate Court dismissing the suit cannot be interfered with.

20. In the result, the appeal is dismissed and the judgment and decree passed by the appellate Court are hereby confirmed. In the peculiar circumstances of the case, the parties are to bear their own costs throughout.